UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Jacqueline, Jaime, Michael, and Shena VanLoozenoord,

Charging Party,

v.

Mountain Side Mobile Estates Partnership, and Mr. and Mrs. R. D. Dalke,

Respondents.

AND

The Secretary, United States Department of Housing and Urban Development, on behalf of Michael Brace,

Charging Party,

v.

Mountain Side Mobile Estates Partnership, and Mr. and Mrs. R. D. Dalke,

Respondents.

HUDALJ 08-92-0010-1
HUDALJ 08-92-0011-1
Decided: September 20, 1993

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Before: WILLIAM C. CREGAR
Administrative Law Judge

SECOND INITIAL DECISION ON REMAND AND ORDER

Statement of the Case

On July 19, 1993, the Secretary of Housing and Urban Development ("the Secretary") issued a Decision and Order ("Secretarial Decision") reversing and again remanding portions of this case concerning the Charging Party's allegations of familial status discrimination based on Respondents' three-person per lot occupancy limit.[1] *See* 24 C.F.R. § 104.930(a) and (d). Specifically, the Secretary found that a disparate impact analysis is applicable to the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"), and that the Charging Party had proved a prima facie case of disparate impact by use of nationwide statistics. The Secretary also found that rather than the "business justification" test as articulated in *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 658-59 (1989), the appropriate test is one of "business necessity" as set forth in *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984).

The Secretary remanded the case for application of the "business necessity" test, and if necessary, further consideration of the third prong of the disparate impact analysis, that is, whether there are alternative methods of fulfilling Respondents' business concerns while lessening the discriminatory impact. I now address those issues remanded by the Secretarial Decision.

Summary of Facts[2]

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[1]In the Initial Decision and Order (Mar. 22, 1993) ("Initial Decision"), I found the Charging Party had failed to prove that Respondents' three-person occupancy limit was discriminatory against Complainants under either a disparate treatment or disparate impact analysis. On April 21, 1993, the Secretary remanded the Initial Decision to permit consideration of the Charging Party's April 13th Motion for Partial Reconsideration and Respondents' opposition thereto.

On June 18, 1993, I issued an Initial Decision on Remand and Order ("Initial Decision on Remand") again denying the Charging Party's request for relief. The Initial Decision on Remand reiterates the findings and conclusions of the Initial Decision concerning the Charging Party's alleged disparate treatment and impact cases. I again determined that the Charging Party failed to establish a prima facie case of disparate impact because of its reliance on nationwide statistics, and that even if a prima facie case existed, Respondents demonstrated that the alleged discriminatory business practice, the three-person limit, serves their legitimate business goals under the business justification test articulated by *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 658-59 (1989).

[2]The Findings of Fact are set forth in the Initial Decision.

The following reference abbreviations are used in this decision: "Res. Ex." for Respondents' Exhibit; "C.P. Ex." for Charging Party's Exhibit; "Tr. 1," "Tr. 2," and "Tr. 3" for Transcript Volumes I, II, and III.

Mountain Side Mobile Estates ("the Park") is a trailer park located at 17190 Mt. Vernon Road, Golden, Colorado, in unincorporated Jefferson County. The Park has a population of approximately 320 persons, with approximately 30 families with children under 18 years of age. It was developed in the 1960's and has less space and amenities than parks built in the 1970's and later.

The Park has 229 lots for mobile homes with a total of 463 bedrooms.[3] The Park has an average of 10 lots per acre, almost twice the density of newer parks which average five to six homes per acre. The Park has limited recreational facilities and narrower streets compared to later-built parks. It can easily accommodate older "single-wide" homes, which measure 8 to 10 feet wide by 30 to 55 feet long, and typically have one or two bedrooms. Current standard "single-wide" trailers are 16 feet wide by 70 to 80 feet long. Modern "double-wide" homes measure 32 by 80 feet, and contain three or four bedrooms. Because of lot and street dimensions as well as the location of the Park's infrastructure, which includes water and gas lines, the Park cannot accommodate modern "single-wide" or "double-wide" homes. The Park is located in a flood plane, and accordingly, significant modifications of the Park's infrastructure would require compliance with regulations of and approval by the Federal Emergency Management Agency, and could involve expenditures in the hundreds of thousands of dollars.

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[3]The number of bedrooms is derived from the QCI Report, *see infra*, and is an additional finding of fact. *See* Res. Ex. 14, Appendix pp. 3-16.

Prior to the effective date of the Fair Housing Amendments Act of 1988, the Park was an "adults only" Park. Respondents determined that it would not be feasible to qualify for the "55 and older" statutory exemption. *See* 42 U.S.C. § 3607 (b)(2). Accordingly, they decided to permit families with children. However, fearing an unlimited expansion of the Park's population, they considered instituting occupancy limits. Based on a Park population study and a concern that overcrowding would place a burden on the water[4] and sewer capacity and result in a decline in the quality of life, Respondents imposed a three-persons-per-unit occupancy limit. Respondents did not consider alternatives other than an occupancy limit to be feasible.

Following the conciliation of an earlier housing discrimination complaint, Respondents retained QCI Development Services Group, Inc. ("QCI") to conduct an independent assessment of the Park's facilities and to assist in evaluating Respondents' occupancy standard. As a result of its assessment of the sewer system and the Park's physical limitations, QCI recommended a two-persons-per-bedroom standard with a maximum limit of 916 Park residents. QCI described the 916 limit as a "brick wall," or an absolute maximum that Respondents could not exceed.

Despite QCI's recommendation, Respondents elected to maintain their existing limit of three-persons-per-unit, thus restricting the total Park occupancy to 687 residents, well within the cap recommended by QCI. Respondents decided that the quality of life would be severely diminished because of the Park's physical limiting features if the Park had as many as 916 residents. Moreover, if the Park reached QCI's recommended maximum capacity of 916, the Park could not accommodate guests, including the numerous seasonal visitors to the resort area.

Complainants are an unmarried couple, Jacqueline VanLoozenoord and Michael Brace, and Ms. VanLoozenoord's three minor children. After Complainants purchased a mobile home without informing the Park managers, Respondents brought eviction proceedings against them because the number of occupants in their dwelling exceeded three persons. The Jefferson County court granted judgment for Respondents, but HUD's conciliation efforts resulted in a stay of the eviction pending the outcome of this proceeding.

Discussion

I conclude that Respondents have demonstrated that the occupancy standard is a "business necessity sufficiently compelling to justify the challenged practice;" that the Charging Party has the burden to demonstrate that a less discriminatory alternative exists that will accomplish the need addressed by the challenged practice; and that the Charging Party has failed to make this demonstration. I further conclude that the record reflects a lack of feasible, less discriminatory alternatives, regardless of whether the Charging Party or Respondents have the burden of persuasion.

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[4] I concluded that the record did not support Respondents' claim that overcrowding would adversely affect the Park's water pressure. Initial Decision, p. 19 n.17.

The Business Necessity Standard

In a disparate impact case, once a complainant establishes a prima facie case, a respondent must prove business necessity. *Betsey,* 736 F.2d at 988. *See also Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975). A respondent may meet this burden by demonstrating "a business necessity sufficiently compelling to justify the challenged practice." *Betsey,* 736 F.2d at 988.[5]

The "business necessity" standard in Title VIII cases is imported from employment discrimination caselaw under Title VII. "Business necessity" in the employment discrimination arena requires that the alleged discriminatory practice be "related to job performance. . . . [It must] bear a demonstrable relationship to successful performance of the jobs for which it was used." *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971).[6] The practice in question must have a manifest relationship to and must, in fact, serve an employer's legitimate interests in job performance. Objective evidence, as opposed to an employer's mere speculation or subjective opinion, that a practice addresses an employer's legitimate concerns can save the practice from a finding of discriminatory effect. *See, e.g., Dothard v. Rawlinson,* 433 U.S. 321, 331-32 (1977); *Albemarle Paper Co.,* 422 U.S. at 431-33; *Griggs,* 401 U.S. at 431-32. Proof that a practice is "job-related" may be established by a showing that the practice is necessary for the safe, efficient operation of the business. *See Williams v. Colorado Springs, Colo. Sch. Dist.,* 641 F.2d 835, 840 n.2 (10th Cir. 1981); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

Because "job-relatedness," is an employment concept, its Title VIII analog must be redefined to address the legitimate interests of housing providers rather than employers.[7]

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[5] A respondent's burden is heavier than that in a disparate treatment case which requires the mere *articulation* of a legitimate reason for the alleged discriminatory behavior. *Compare Betsey*, 736 F.2d at 988, *with Pollit v. Brammel,* 669 F. Supp. 172, 175 (S.D. Ohio 1987) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804 (1973)).

[6] *Griggs* and its progeny use the terms "business necessity" and "job-relatedness" interchangeably. Also, the most recent amendment to Title VII, the Civil Rights Act of 1991 ("C.R.A. 1991"), upon which the Secretary relied in rejecting the *Wards Cove* standard, considers "job-relatedness" to be consistent with "business necessity." *See* 42 U.S.C. § 2000e-2 (k)(1)(A)(i); *see also* 137 Cong. Rec. S15276 (daily ed. Oct. 25, 1991) (Interpretive Memorandum), *reprinted in* 1991 U.S.C.C.A.N. 767 [hereinafter Interpretive Memorandum]; Arthur Larson & Lex K. Larson, 3 *Employment Discrimination* § 78.11 (1990).

[7] As stated by the United States Court of Appeals for the Third Circuit, "[I]t appears. . .that the job-related qualities which might legitimately bar a Title VII-protected employee from employment will be much more susceptible to definition and quantification than any attempted justification of discriminatory housing practices under Title VIII. . . . Title VIII criteria must emerge, then, on a case-by-case basis." *Resident Advisory Bd. v. Rizzo,* 564 F.2d 126, 148-49 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978). "The difficulty . . .is that in Title VIII cases there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related." *Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, 936 (2nd Cir.), *aff'd* 488 U.S. 15 (1988).

Drawing an analogy from the Title VII job-relatedness tests, I conclude that the "business necessity" test as applied to Title VIII has two components. First, the challenged practice must bear a demonstrable relationship to a housing provider's legitimate business interests; and second, objective evidence must establish that the means selected to serve those interests must be reasonably likely to effectuate those interests and not otherwise be unlawful.

Demonstrable Relationship to Legitimate Business Interests

Both economic viability and concern for the safety and health of tenants are legitimate business concerns. Economic viability is the *sine qua non* of a business. Private housing providers would not provide housing for anyone, including families with children, if they could not realize a profit. Indeed, one of the underlying purposes of the Act is to maximize housing opportunities for families with children. *See HUD v. Murphy*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,002, 25,042 (HUDALJ July 13, 1990). The greater the number of economically viable housing complexes, the greater the number of units that will be available for occupancy by families with children.

Sanitation and safety concerns, in and of themselves, are also legitimate.[8] "It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit . . . to remedy the *unsafe and unsanitary housing conditions* and the acute shortage of decent, *safe, and sanitary* dwellings for families of lower income . . . ." 42 U.S.C. § 1437 (emphases added). *See* House Comm. on the Judiciary, *Fair Housing Amendments Act of 1988,* H.R. Rep. No. 711, 100th Cong., 2d Sess. 30 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173 ("[A] landlord or owner may ask . . . a targeted inquiry as to whether the individual has engaged in acts that would pose a direct threat to the health or safety of other tenants . . ."); *see also id.* at 28-29. Moreover, because unsanitary or unsafe housing conditions will detract from a housing complex's marketability, they affect the economic viability of a housing complex. Therefore, the business necessity standard under Title VIII legitimately includes consideration of health and safety concerns.

These two concerns - assuring the health of the Park's tenants and maintaining a profitable enterprise - are in fact the reasons for Respondents' decision to institute an occupancy limit. Respondents have met the first part of the the two part test, i.e., to demonstrate a relationship between the imposition of an occupancy limit to prevent overcrowding, and in turn, their legitimate business interests in the Park's economic viability and the health of its tenants.

Overcrowding could have at least two undesirable consequences. First, it could put the health of the Park population at risk by overwhelming the sewer system. Respondents demonstrated the validity of their health and sanitation concerns based on the effect that overcrowding would have on the Park's sewer system. The Park had previously experienced

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[8]The Charging Party recognizes the legitimacy of this concern. *See* Charging Party's Memorandum on Second Remand, p. 14 (Aug. 27, 1993) ("Charging Party's Memo on Remand").

sewer blockages. The record further demonstrates that unsanitary conditions would result if the number of occupants exceeded 916. *Cf. McCauley v. City of Jacksonville, S.C.,* 739 F. Supp. 278, 282 (E.D. N.C. 1989) (Sewage problems resulting in a building moratorium would have constituted a business necessity.), *aff'd*, 904 F.2d 700 (4th Cir. 1990). Second, it could affect the Park's economic viability because it could result in an exodus of tenants seeking to avoid these conditions. The same unsanitary conditions causing the exodus could discourage or prevent new tenants from moving into the Park. In addition, the Park's limited open space and recreational facilities, narrow roads, limited off-street parking, and small lots justify Respondents' concern that overcrowding would adversely affect the Park's continued economic success. Even if the population increase did not become so serious as to become a sanitation risk, the record demonstrates that at some point the Park could become congested, unattractive, and unpleasant, thereby causing existing tenants to seek a more desirable place to live.[9]

Reasonableness of the Challenged Practice to Effectuate
the Legitimate Business Interest

Respondents' imposition of a three-person-per-unit occupancy limit is not otherwise illegal and will stem overcrowding. Respondents have demonstrated that their selected limitation of three-persons-per-unit would eliminate the risk of overcrowding with its resultant negative impact on the Park's economic viability and sanitation.

Objective evidence establishes that Respondents' selected means were reasonably likely to maintain a healthy and economically viable park. The Charging Party attempts to make much of the fact that Respondents' selection of an occupancy limit of three-persons-per-unit would result in a maximum Park population less than the population capacity of the Park's sewer system. In fact, the selection of this limitation under the circumstances of this case is logical. Respondents' reasons for selecting this lower limitation were 1) that it allowed for seasonal visitors without overburdening the Park's physical limitations, and 2) that a population less than the maximum capacity of 916, i.e., four persons per unit, could live in greater comfort. Permitting seasonal visitors made the Park a more desirable place to live for those wishing to spend time with their visiting families. The record also supports the Park managers' conclusion that the physical limitations of the Park warrant a limitation less than the maximum capacity of 916. Objective evidence in support of their selection of the three-person-per-unit limit is supplied by (1) the QCI Report that establishes that more than four persons per unit, i.e., 916 occupants, could lead to unsanitary conditions and (2) testimony that there were seasonal visitors. Consequently, a four-person-per-unit limit combined with seasonal visitors would exceed the maximum 916 occupants. The Park's physical limitations also provide objective

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[9]Respondents recognized that they might be able to rent all of their lots more quickly without an occupancy limit. Respondents rejected this option in order to ensure that once the tenants resided at the Park, they would not later want to leave what had become an overcrowded environment. Respondents described their business in the following way: "we are in this park for the long run. . . . [I]f we were only there to own it for a short period of time, the thing to do would be to take as many people as we can, get our rents up. . . and sell. . . . But. . . we're not here today gone tomorrow kind of people." Tr. III, p. 237. *See also* Tr. I, pp. 244-45; Tr. III, pp. 218, 224.

evidence. *See* Initial Decision, pp. 3-4.

Any occupancy limit must be based on whole numbers, not fractions. Because Respondents based their limitation on the total capacity of the Park and rejected four-persons-per-unit as creating health and sanitation risks and overcrowded conditions, they were compelled to consider the next lower limit of three-persons-per-unit. A unit cannot, for example, accommodate 3.5 persons.

In addition, under the circumstances of this case, an occupancy limitation may properly be based on the assumption that without such a restriction, the Park could reach or exceed 916 occupants. Moreover, Respondents were entitled to take prospective action before a situation arose which could not be redressed. Although the Park population was far less than 916 at the time Respondents implemented their restriction, they were entitled to forecast and address a situation which could threaten the continued health of their business.

Finally, Respondents' occupancy limit is not otherwise illegal. Reasonable occupancy restrictions are lawful, and certain types are specifically authorized both by the Act and HUD's regulations. The particular restrictions contemplated in the regulations limit the number of occupants per housing unit (or per bedroom) and regulate the square footage per unit in order to prevent overcrowding *per unit* based on health and safety reasons. *See* 42 U.S.C. § 3607(b)(1); 24 C.F.R. § 100.10(a)(3); Ch.I, Subch. A, App. I, pp. 918-19 (1993); H.R. Rep. No. 711 at 31. The Charging Party's position is premised upon the assumption that only these restrictions which address overcrowding *per unit* are lawful. *See* Charging Party's Memo on Remand. However, neither the Act nor the regulations specifically prohibit occupancy restrictions intended to prevent overcrowding in an *entire housing development*, as opposed to each individual housing unit. Further, given that the Act and regulations authorize per unit limits based on health and safety concerns for each *unit*, there is no logical reason to conclude that per unit limits based on health and safety concerns for an *entire housing development* are not also authorized. A housing provider should be entitled to address overcrowding in a development in a manner calculated to provide a safe, healthy, and appealing environment that will continue to attract prospective housing seekers so essential to maintaining a profitable and efficient business.

Alternative Solutions

I conclude that the Charging Party has the burden to demonstrate that a less discriminatory alternative exists which would accomplish the need addressed by the challenged practice. The Charging Party, relying on lower court Title VIII cases,[10] contends that

[10]The Charging Party ultimately relies on *Williams v. Matthews Co.*, 499 F.2d 819, 828 (8th Cir.), *cert. denied*, 419 U.S. 1027 (1974) and *Rizzo*. It also relies on *HUD v. Carter*, 2 Fair Housing-Fair Lending (P-H), ¶ 25,029, 25,317 (HUDALJ May 1, 1992), and *Cason v. Rochester Hous. Auth.*, 748 F. Supp 1002, 1007 (W.D.N.Y. 1990). *Carter* relies on *Rizzo*, and *Cason* cites *Huntington Branch, NAACP*, which in turn refers to *Rizzo*. Neither *Williams* nor *Rizzo*, however, is controlling on the issue of who carries the burden of proving less discriminatory alternatives. *Williams* predates the seminal Supreme Court cases, *see infra* p. 9, and I interpret the test as set forth in *Rizzo* to be contradictory. On the one hand, the *Rizzo* court states that as part of its burden to demonstrate a

Respondents carry this burden. The Supreme Court has made clear that the Charging Party has the burden of establishing the existence of less discriminatory alternatives. In a Title VII case, the Court stated, "[i]f the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also `serve the employer's legitimate interest.'" *Dothard*, 433 U.S. at 329 (quoting *Albemarle Paper*, 422 U.S. at 425). Just as the *McDonnell Douglas* Title VII shifting-burdens analysis has been applied in Title VIII disparate treatment cases, this Title VII shifting-burdens analysis is apropos for Title VIII disparate impact cases.[11] *See also Peyton v. Reynolds Assocs.*, 955 F.2d 247, 252-53 (4th Cir. 1992). In any event, regardless of which party shoulders the burden, the record contains no evidence of a feasible alternative with less discriminatory effect.

The Charging Party suggests numerous alternatives to address the sewer and quality of life problems that would result from overcrowding.[12] The recommendations fall into three categories: 1) adoption of alternate occupancy limits; 2) physical alterations to the Park or individual units; and 3) the imposition of restrictions on the terms and conditions of residence. These solutions are unacceptable either because they also discriminate, are impractical, or are prohibitively expensive.[13]

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business necessity, defendant "must show that no alternative course of action could be adopted that would enable [the legitimate business] interest to be served with less discriminatory impact." *Rizzo*, 564 F.2d at 149. On the other hand, the court appears to contradict this statement in a footnote which states that "[i]f the defendant does introduce evidence that no such alternative course of action can be adopted, the burden will once again shift to the plaintiff to demonstrate that other practices are available." *Id.* at n.37. Logically, once a defendant has shown that there are no other alternatives, there would never be a need to shift the burden back to the complainant because a proposition once proved cannot be disproved. The Supreme Court's allocation of burdens as set forth in its Title VII decisions does not present this interpretive problem. *See infra*. Accordingly, I have adhered to the Supreme Court's allocation of the burdens of persuasion in disparate impact cases. Also, in a recent Title VII pronouncement, the Court confirmed that the Charging Party carries the ultimate burden. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

[11]In amending Title VII Congress articulated one of the purposes of the C.R.A. 1991 as reinstating "the concepts enunciated by *the Supreme Court* in [*Griggs*] and in other *Supreme Court* decisions prior to *Wards Cove*. . . ." Interpretive Memorandum.

[12]The Charging Party suggested various alternatives in its Post-hearing Brief and raises others for the first time in its Memo on Remand.

[13]The Charging Party, relying on the conference report for C.R.A. 1991, asserts that "expense alone is not sufficiently compelling to overcome the discriminatory operation of the current occupancy limitation." Charging Party's Memo on Remand, pp. 15-16. I disagree with this generalization. Congress enacted legislation stating that the Interpretive Memorandum, and presumably not the conference report, is to be cited as the legislative history. *See* Public Law 102-166, § 105(b); *see also supra* notes 6 and 11. Also Congress did not intend that the Act unduly burden housing providers. Excessive costs would result in such an undue burden. As Congresswoman Pelosi stated, "This bill is carefully crafted to protect American families, without placing an undue burden on owners and landlords." 134 Cong. Rec. H4687 (daily ed. June 23, 1988). *See also id.* at 4681, 4683; H.R. Rep. No. 711, at 18, 26-28, 30-31.

Alternate Occupancy Limits

The adoption of QCI's suggested population limit of 916, or four occupants per unit is unacceptable.[14] Although I recognize that larger occupancy limits have a less discriminatory impact than smaller limits,[15] they must be rejected because they affect the Park's economic viability and do not address overcrowding. As discussed *supra,* adoption of the 916 limit would create difficulties given the influx of seasonal and other visitors and potentially affect the Park's sanitation. Any restriction greater than four is similarly flawed.

The Charging Party recommends that Respondents impose an overall maximum population ceiling on the Park regardless of the number of occupants per unit. This alternative, however, is economically impractical because the total Park population could be reached before Respondents are able to rent all of their lots. In addition, Respondents might be compelled to prohibit the sale of units and rental of spaces once this limit was reached. Once the maximum population ceiling was reached, Respondents' refusal to rent a unit because of the number of prospective residents could subject them to charges of disparate treatment. For example, once the limit was reached, Respondents would be compelled to evict an expectant mother after the birth of her child. Prior HUD and perhaps State approval would be necessary to insulate Respondents from liability.

The Charging Party also suggests adoption of a minimum square footage requirement for each occupant's sleeping area. This solution, however, would not necessarily prevent overcrowding. In this regard I note that instituting this alternative would not have prevented young Myron from joining Complainants' family as a sixth resident. Although there was no additional sleeping area in Complainants' home, they converted the utility room into a fourth bedroom for Myron. Further, even were Respondents to require a certain square footage of living space for each occupant, this alternative would not necessarily be a less discriminatory one. I note that there are a number of one-bedroom homes in the Park and that the mobile homes in the Park are small by today's standards. The record fails to demonstrate that adoption of either a

minimum square footage requirement per bedroom or per unit would result in a less discriminatory impact on families with children.

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[14]The Charging Party does not suggest a four-person-per-unit limit. However, I have nevertheless considered this option. I note that this option would require eviction of two members of the VanLoozenoord/Brace family.

[15] Limits of one- and two-persons-per-unit are even more discriminatory than three-persons-per-unit. A one-person limit obviously will exclude families with children. Similarly, a two-person limit will have a discriminatory impact. Using the same statistics and methods of calculation relied on by the Charging Party, I conclude that at least 74% of all U.S. households with three or more persons contain at least one child under the age of 18, at least 87% of U.S. families with minor children have three or more persons, and at most 17% of households without minor children have three or more persons. *See* C.P. Ex 29, p.7. Thus, a two-person limit would be prima facie discriminatory.

Another suggested occupancy limit is based upon a limitation on the number of occupants per bedroom. A number of units have more than two bedrooms. Because of the number of bedrooms in the Park, Respondents proved by a preponderance of the vidence that a potential for overcrowding resulting from the limited capacity of the sewer system existed if each bedroom had two occupants.[16]

Physical Alterations to the Park

The Charging Party offers various unworkable solutions for the sewer problems. The first suggestion involves enormous costs. It suggests that Respondents remedy any sewer blockage problem by replacing one piece of pipe along Mt. Vernon Road. Although this solution appears to entail only minimal cost, it involves additional major impediments and associated costs, such as obtaining a permit from FEMA, and possibly removing the Park from the flood plain. In any event, there was credible testimony that replacing this one section of pipe might not cure the sewerage problems.

The Charging Party proposes that Respondents combine lots to create larger rental units. While combining lots would create larger rental units and alleviate the Park's density, it might be economically unrealistic because the larger lot might not support the double rental required for Respondents to maintain income at the same level. Decreasing the number of rental units could decrease revenues. It would also require the eviction of existing tenants and the forced sale and removal of their homes.

Restrictions on Terms and Conditions of Residence

The Charging Party suggests preventing "sewer overload" by limiting the number of toilets per unit or instituting water conservation and "demand control."[17] Even if Respondents were able to enforce these restrictions, the potential health problems associated with these alternatives are readily apparent. Not only could Park residents face the prospect of too few toilets, they could also endure intrusive policing to enforce this policy.

To address the lack of available parking spaces, the Charging Party proposes that Respondents restrict the number of vehicles per mobile home. While this would ameliorate the parking problem, it would not address Respondents' primary concerns of preventing overcrowding and overwhelming the sewer system.

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[16] According to the QCI study, there were more than 458 bedrooms in the Park. Res. Ex. 14, Appendix pp. 3-16. A population of two-persons-per-bedroom would exceed the allowable sewerage capacity of 916 persons.

[17] The Charging Party relies on *U.S. v. Lepore*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,807, 17,260-61 (M.D. Pa. Dec. 23, 1991), for the proposition that the Park's sewerage problems could be alleviated by water saving devices and behavior modification. The judge in that case relied to a significant degree on the testimony of the Government's expert witness. There is no similar expert testimony in this case.

Finally, the Charging Party opines that Respondents could have prospectively prohibited larger mobile homes, prohibited further sub-code additions to the original homes, or allocated a few lots for recreational or parking areas. The record does not reflect the impact of any of these proposed alternatives or their feasibility.

CONCLUSION AND ORDER

Accordingly, it is again **ORDERED** that the charge of discrimination is *dismissed,* and the Charging Party's request for relief is *denied.*

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WILLIAM C. CREGAR
Administrative Law Judge